IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.312 OF 2005

Shri Bapurao Marutrao Palande .. ..Appellant

Versus

Maruti Ganpat Khaire and Ors. .. ..Respondents

Mr.K.K.Malpathak for appellant

CORAM : P.V.KAKADE, J.

DATE : 19TH JULY 2005.

P.C.:

1. This is an appeal preferred by the appellant against the judgment and order passed by the Addl.District Judge, Pune dated 22.4.2004 dismissing the appeal and confirming the judgment and decree passed by Civil Judge, Senior Division, Pune dated 4.2.1998 decreeing the suit.

2. I have heard the learned counsel for the

appellant. Perused the record.

3. The plaintiff field the suit for declaration and injunction against the defendants alleging that the Sale Deed dated 11.9.1989 executed by defendant no.1 in favour of the defendant no.2 was illegal and not binding on him and that he was in possession of the suit property on the date of filing of the suit. The defendants challenged the suit on the ground that the defendant no.1 was exclusive owner and possessor of the suit property prior to the date of the suit by virtue of Sale Deed dated 11.9.1989 and therefore, sought dismissal of the suit.

4. The learned trial judge adjudicated the dispute and came to the conclusion that the plaintiff had proved the sale deed dated 11.9.1989 was not binding on him and also that he was in possession of the suit property on the date of filing of the suit, therefore, the suit came to be decreed. The appeal was carried to the District Court. The learned Addl. District Judge after hearing both the parties came to the conclusion that the findings recorded by the lower court were just legal and proper and therefore, the appeal came to be dismissed.

Hence the present appeal.

5. At the outset it may be noted that there is no substantial question of law involved in this appeal. The concurrent findings recorded by both the courts below are in consonance with the available evidence on record. It was submitted on behalf of the appellant that the appellant had filed application in the lower appellate court submitting that the matter should be remanded, as the defendant no.1 not get the opportunity to lead his evidence due to his illness. The application came to be decided along with the appeal, however, the formal order of rejection of the application was made subsequent to the declaration of the appeal court judgment. I have perused the relevant record, it appears that the said application seeking remand of the matter was properly adjudicated by the lower appellate court at the time of adjudicating the appeal itself, as can be seen from the discussion in the body of the judgment. It appears that thereafter endorsement was made on the said application to the effect that "In view of the observations made in the judgment, application is rejected". This aspect prompted the learned counsel for the appellant to show

that the defendant is subjected to prejudice and therefore, remand of this matter should be considered. However, I have perused the judgments of both the courts below as well as copy of the medical certificate. It is pertinent to note that the defendant no.1 had appointed Power of Attorney to look after the present proceeding and he was aware of the factual aspects involved in the matter. In fact it is seen from the record that sufficient opportunity was made available to the appellant to lead evidence in support of his contentions with regard to the alleged partition, but he failed to produce any evidence in the lower court. On this aspect the learned lower appellate court judge has rightly observed that it was not fit case for remand. I am inclined to endorse this view, in view of the facts and circumstances.

6. In view of this position and fact that both the courts below have recorded their findings on merits to the effect that the impugned sale deed is not binding on the plaintiff for the reasons elaborately discussed and the fact that the plaintiff was in actual possession of the suit property on the date of the suit, the suit is seen to be properly decreed and hence I do not take it

necessary to interference in the concurrent findings recorded by both the courts below.

. In the result the appeal stands dismissed.